

(29,995)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1923

No. 685

JOHN F. STEELE, APPELLANT,

vs.

THE UNITED STATES OF AMERICA

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK

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CITATION

United States of America to William Hayward, United States Attorney for the Southern District of New York, Greeting:

Whereas, John F. Steele has lately appealed to the Supreme Court of the United States from an order, judgment or decree lately rendered in the District Court of the United States, for the Southern District of New York, by which his application to review the decision and findings of United States Commissioner Samuel M. Hitchcock, was denied, and by which his application to set aside the search warrant above described was denied, and the said John F. Steele has filed security required by law; you are, therefore, hereby cited to appear before the said Supreme Court at the City of Washington, on the 12th day of December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand in the City of New York in the Second Circuit, this 14th day of November, 1923.

Augustus N. Hand, Judge of the United States District Court for the Southern District of New York.

[fol. 2] **DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK**

In the Matter of the Application of JOHN F. STEELE to Vacate a Search Warrant Issued by Hon. Samuel M. Hitchcock, United States Commissioner, on the 6th Day of December, 1922, Directing One Isidor Einstein to Search Premises 611 W. 46th Street, Borough of Manhattan, City and Southern District of New York

PETITION FOR AND ORDER ALLOWING APPEAL

John F. Steele, the applicant above named, conceiving himself aggrieved by the order, judgment or decree made and entered on the 9th day of November, 1923, in the above entitled proceeding, does hereby appeal from said order, judgment or decree to the Supreme Court of the United States for the reasons specified in the assignment of errors, which is filed herewith, and prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order, judgment or decree was made, duly authenticated, may be sent to the Supreme Court of the United States.

Dated, New York, N. Y., November 14, 1923.

Celler & Kraushaar, Attorneys for Applicant, Office & P. O. Address 51 Chambers Street, Borough of Manhattan, City of New York.

The foregoing claim of appeal is allowed.

Dated, November 14th, 1923.

Augustus N. Hand, United States District Judge.

[fol. 3] DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ASSIGNMENTS OF ERROR

John F. Steele prays an appeal from the final order, judgment or decree of this Court made and entered herein on November 9th, 1923 to the Supreme Court of the United States and assigns for error,

1. That the search warrant above described should have been vacated and quashed, and the property seized thereunder returned to him on the grounds,

(a) Because the said search warrant was issued by the said United States Commissioner in violation of the fourth amendment to the Constitution of the United States, in that the same was not issued upon probable cause supported by oath or affirmation and naming the person and particularly describing the property to be seized or the place to be searched.

(b) Because the said search or seizure conducted under the said warrant aforesaid was unreasonable.

(c) Because the said search warrant was issued in violation of Article 5 of the amendments to the Constitution of the United States, in that the same deprived the claimant of his property without due process of law, and on the further ground that by virtue thereof the claimant was compelled to be a witness against himself in a criminal [fol. 4] proceeding.

(d) Because the said warrant was issued based upon conjecture, surmise and suspicion, and not upon reasonable or probable cause, in violation of the aforesaid provisions of the Constitution.

(e) Because the said search warrant limited the officer to whom it was directed to the search of premises 611 W. 46th Street, Borough of Manhattan, City and Southern District of New York, and that the officer, in making the search in violation to such Constitutional guarantee, searched other and different premises, to wit, premises 609 W. 46th Street, in said Borough of Manhattan, City and Southern District of New York.

Wherefore, the said John F. Steele prays that the final order, judgment or decree of the said District Court be reversed.

Dated, New York, N. Y., November 14, 1923.

Celler & Kraushaar, Attorneys for John F. Steele, Office & P. O. Address 51 Chambers Street, Borough of Manhattan, City of New York.

[fol. 5] At a Stated Term of the United States District Court Held in and for the Southern District of New York, in the Post Office Building, in the Borough of Manhattan, City of New York, this 9th day of November, 1923

[Title omitted]

JUDGMENT

The petition of John F. Steele, above named, having been presented, praying that the proceedings of United States Commissioner Samuel M. Hitchcock be reviewed, and that an order vacating and setting aside the search warrant above described and directing the return to the applicant, John F. Steele, of the property seized by virtue of and under color of said warrant, and said application having come on to be heard before said Court on the 5th day of November, 1923.

Now, upon reading and filing the notice of application dated October 30, 1923, the petition of Meyer Kraushaar, verified October 30, 1923, the affidavit of Isidor Einstein, verified December 6, 1922, upon which the search warrant above described was issued, the search warrant signed by Samuel M. Hitchcock, Esq., United States Commissioner, bearing date December 6, 1922, the return made by said Isidor Einstein, endorsed on the back of said warrant, the affidavit of John F. Steele, verified December 21, 1922, to controvert said [fol. 6] warrant, the depositions of Isidor Einstein, Moe W. Smith and John F. Steele, taken before said Commissioner, the exhibits offered in connection therewith, and the decision and findings of the said Commissioner refusing to quash said search warrant and refusing to direct the restoration to the claimant of the property seized thereunder, all of which are submitted in support of said application, and after hearing Meyer Kraushaar, Esq., of counsel for said claimant, John F. Steele, and Elmer H. Lemon, Esq., Assistant United States Attorney, in opposition thereto and due deliberation having been had thereon, in accordance with the provisions of Section 16 of an Act of Congress of June 15, 1917, Chapter 30, Article II, of an Act to Punish Acts of Interference with Foreign Relations, etc., it is

Ordered, adjudged and decreed, that the application to vacate said search warrant and to restore the property to the claimant be denied on the ground that the property taken is the same as that described in the warrant, and that there is probable cause for believing the existence of ground on which the warrant was issued, and it is further

Ordered, adjudged and decreed, that the said property remain in the custody of the officer by whom the same was seized, or to be otherwise disposed of according to law.

Enter.

Francis A. Winslow, U. S. D. J.

[fol. 7] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

NOTICE OF MOTION

Upon the annexed petition of Meyer Kraushaar, verified the 30th day of October, 1923, and upon the affidavit of Isidor Einstein, verified December 6, 1922, the search warrant issued by the Hon. Samuel M. Hitchcock, dated December 6, 1922, requiring Isidor Einstein, general Prohibition Agent, to search premises 611 W. 46th Street, in the Borough of Manhattan, City and Southern District of New York, and the return made by said Isidor Einstein, the depositions taken before the said United States Commissioner, Samuel M. Hitchcock of Isidor Einstein, Moe W. Smith and John F. Steele, upon the decision made by the said United States Commissioner and the affidavit of John F. Steele verified December 21, 1922, and upon all other proceedings had herein, the undersigned will move this Court at a Stated Term thereof, to be held in Room 331 in the Post Office Building in the Borough of Manhattan, City and Southern District of New York, on the 5th day of November, 1923 at 10:30 o'clock in the noon, or as soon thereafter as counsel can be heard, for an order vacating and setting aside the search warrant above described, and directing the return to the said John F. Steele, [fol. 8] the claimant above named, of the property seized under said search warrant, and for such other and further order in the premises as may be just.

Dated, New York, N. Y. Oct. 30, 1923.

Meyer Kraushaar, Attorney for John F. Steele, Office & P. O.
Address 51 Chambers Street, Borough of Manhattan, City
of New York. To Hon. William Hayward, United States
Attorney for the Southern District of New York; Hon.
Samuel M. Hitchcock, United States Commissioner, Post
Office Building, New York City.

[fol. 9] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF
NEW YORK

[Title omitted]

PETITION FOR ORDER VACATING SEARCH WARRANT

To the Honorable Judges of the United States District Court for the
Southern District of New York:

The petition of Meyer Kraushaar respectfully shows to this Court:

1. That he is a member of the Bar of this Court, and is the attorney for John F. Steele, above named.

2. That on the 6th day of December, 1922, Samuel M. Hitchcock, Esq., United States Commissioner, upon an affidavit made by one Isidor Einstein, verified December 6, 1922, issued a search warrant under the provisions of an Act of Congress of June 15, 1917, Chapter 30, Article 11, which said search warrant directed the said Isidor Einstein to search for intoxicating liquor containing more than one-half of one per cent of alcohol by volume, fitted for beverage use, in the premises 611 W. 46th Street, Borough of Manhattan, City and Southern District of New York and if found, to seize the same.

3. That the said Isidor Einstein, acting for and by virtue of and under color of said warrant, did enter premises 609 W. 46th Street, [fol. 10] Borough of Manhattan, City and Southern District of New York, as well as the premises described in said warrant, and did seize thereunder a large quantity of property belonging to said John F. Steele, and the said John F. Steele did, thereupon, in accordance with the provisions of Sections 15 and 16 of said Act of Congress, controvert and move to vacate the said warrant before said Commissioner.

4. The said Commissioner did thereupon take depositions in pursuance of Sections 15 and 16 of said Act and did refuse to vacate and quash the said warrant. That the said John F. Steele feels aggrieved as the result of said *said* decision and desires to have the same reviewed by this Court.

5. That the grounds upon which said search warrant should be vacated and quashed and the property seized returned to the said claimant, are as follows:

(a) Because the warrant issued by said United States Commissioner was issued in violation of the fourth amendment to the Constitution of the United States, in that the same was not issued upon probable cause supported by oath or affirmation, and particularly describing the place to be searched or the person or things to be seized.

(b) Because the said search and seizure conducted under the warrant aforesaid was unreasonable.

(c) Because the said search warrant was issued in violation of Article 5 of the amendments to the Constitution of the United States in that the same deprived the claimant of his property without due process of law, and on the further ground that by virtue thereof the claimant was compelled to be a witness against himself in a criminal proceeding.

[fol. 11] (d) Because the said warrant was issued based upon conjecture, surmise and suspicion, and not upon reasonable or probable cause, in violation of the aforesaid provisions of the Constitution.

(e) That the said search warrant limited the officer to whom it was directed to the search of premises 611 W. 46th Street, Borough of Manhattan, City and Southern District of New York, and that

the officer, in making the search in violation to such Constitutional guarantee, searched other and different premises, to wit, premises 609 W. 46th Street, in said Borough of Manhattan, City and Southern District of New York.

6. That as proof of the allegations herein contained, your petitioner will submit upon the hearing herein the affidavit of said Isidor Einstein verified the 6th day of December, 1922, the said search warrant issued by said Commissioner bearing date the 6th day of December, 1922, the affidavit of John F. Steele, verified December 21, 1922, the return made by the said Isidor Einstein showing the seizure of 150 cases whiskey, 92 bags whiskey, one 5 gallon can of alcohol, six 5-gallon jugs whiskey, 33 cases of gin, 102 quarts of whiskey, two 50-gallon barrels of whiskey, and one corking machine, and the depositions taken before the said United States Commissioner of Isidor Einstein, Moe W. Smith and John F. Steele, and the exhibits and other documents offered before the said United States Commissioner.

Wherefore, your petitioner prays that an order be made setting aside and vacating the said search warrant and directing the return to the claimant of the property above described.

Dated, New York, N. Y. October 30, 1923.

Meyer Kraushaar, Petitioner.

[fol. 12] Jurat showing the foregoing was duly sworn to by Meyer Kraushaar omitted in printing.

[fol. 13] Approved: John M. Cashin, Special United States Attorney. Before Hon. Samuel M. Hitchcock, United States Commissioner for the Southern District of New York.

[Title omitted]

VIOLATION OF THE NATIONAL PROHIBITION ACT

AFFIDAVIT FOR SEARCH WARRANT

SOUTHERN DISTRICT OF NEW YORK, ss:

Isidor Einstein, being duly sworn, deposes and says: I am a General Prohibition Agent assigned to duty in the State of New York. On December 6, 1922, at about 10 o'clock A. M. accompanied by Agent Moe W. Smith, I was standing in front of the garage located in the building at 611 West 46th Street, Borough of Manhattan, City and Southern District of New York. This building is used for business purposes only. I saw a small truck driven into the entrance of the garage and I saw the driver unload from the end of the truck a

number of cases stencilled whiskey. They were the size and appearance of whiskey cases and I believe that they contained whiskey.

A search of the records of the Federal Prohibition Director's office fails to disclose any permit for the manufacture, sale or possession of intoxicating liquors at the premises above referred to.

The said premises are within the Southern District of New York and upon information and belief, have thereon a quantity of intoxicating liquor containing more than one-half of one per cent of alcohol by volume, and fit for use for beverage purposes, which is used, has been used and is intended for use in violation of the Statute of the United States, to wit, the National Prohibition Act.

This affidavit is made to procure a search warrant, to search said building at the above address, any building or rooms connected or used in connection with said garage, the basement or sub-cellar beneath the same, and to seize all intoxicating liquors found therein.

Isidor Einstein.

Sworn to before me this 6th day of December, 1922. Saml. M. Hitchcock, U. S. Commissioner, Southern District of New York.

[fol. 15]

SEARCH WARRANT

The President of the United States of America to Isidor Einstein, General Prohibition Agent:

Whereas, It appears from the affidavit of said Isidor Einstein that certain intoxicating liquor containing more than $\frac{1}{2}$ of 1% of alcohol by volume and fit for use for beverage purposes is unlawfully held and possessed in a certain garage located in the four-story building at 611 West 46th Street, Borough of Manhattan, City, and Southern District of New York, said building being used for business purposes only—and in any safe or desk, store room, container, receptacle, basement or sub-cellar, building, room or rooms connected or used in connection with said garage; and that said liquor is used and is intended for use and has been used in violation of Title II of the National Prohibition Act in that said liquor was and is wilfully, knowingly and unlawfully held in said premises,

Now, therefore, you are hereby commanded in the name of the President of the United States, in the day time only, to enter the said premises, and then and there to search diligently for said liquor, and if the same or any part thereof shall be found on said premises, then you are hereby authorized and commanded to seize and secure the same and to make a return of your doings to the undersigned within ten days from the date hereof.

You are likewise commanded in the event you seize or take said liquor under the warrant to give a copy of this warrant, together with a receipt for the liquor taken, (specifying it in detail) to the person from whom it is taken by you, or in whose possession it is found, or in the absence of any person to leave a copy of this warrant, with the receipt as aforesaid, in the place where said liquor is found.

Immediately upon execution of this warrant you are commanded further to forthwith return the warrant to the undersigned, and to [fol. 16] deliver to him a written inventory of the liquor taken, duly made and verified by you.

Given under my hand and seal this 6th day of December, 1922.

Saml. M. Hitchcock, United States Commissioner for the Southern District of New York.

[fol. 17] (Indorsement in pencil on the warrant:) New York, Dec. 6, 1922. 150 cases whiskey, 92 bags of whiskey, 1 5 gallon can of alcohol, 6 5 gallon jugs of whiskey, 33 cases of gin, 102 quarts whiskey, 2 50 gallon barrels of whiskey, 1 corking machine. Isidor Einstein, General Agents.

[fol. 18] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

AFFIDAVIT OF JOHN F. STEELE

CITY AND COUNTY OF NEW YORK, ss:

John F. Steele being duly sworn deposes and says: That he resides at No. 609 West 46th Street, in the Boro of Manhattan, City, State and Southern District of New York.

That I live on the 3rd floor of said premises. That this affidavit is made to vacate the search warrant issued on the 6th day of December, 1922, by Hon. Samuel M. Hitchcock, U. S. Commissioner for the Southern District of New York, and by virtue of said search warrant Isidor Einstein and Moe Smith seized certain intoxicating liquors. That the search warrant specifically says that the goods seized are located in a certain garage located in the four story building of premises 611 West 46th Street, City, State and Southern District of New York.

It is submitted that practically all of the intoxicating liquors were seized in premises known as and by the street No. 609 West 46th Street, in the Boro of Manhattan, City, State and Southern District of New York.

That 609 West 46th Street is a separate and distinct building from 611 West 46th Street. That both buildings which are made of brick, are occupied as a general storage, with the exception of the [fol. 19] ground floor, which is a garage, and which said buildings are four stories in height. That there is a common party wall between the two buildings.

Upon the hearing a photograph will be produced showing the separate and distinct character of both buildings on the inside as well as the outside.

That there are two separate and distinct entrances to the buildings. That there is an elevator in premises known as and by the

street No. 609 West 46th Street, but there is no elevator in the premises known as and by the street No. 611 West 46th Street. That there is, however, a stairway or hatchway in premises known as and by the street No. 611 West 46th Street; that there is also a stairway in premises known as 609 West 46th Street.

That the following articles were seized by the said agents:

- 150 cases Whiskey.
- 92 Bags Whiskey.
 - 1 Five gallon can alcohol.
 - 6 Five gallon jugs of whiskey.
- 33 Cases gin.
- 102 Quarts whiskey.
 - 2 Fifty Gallon barrels of whiskey.
 - 1 Corking machine.

That the seizure was made on December 6th, 1922.

It is submitted that the 150 cases of whiskey, the 92 bags of whiskey and the one five gallon can alcohol were seized on the third floor of premises 609 West 46th Street, in the premises adjoining the living quarters of your deponent, which living quarters your deponent shares with another man by the name of Oscar Smith, his wife, and child.

That the photographs will distinctly show the curtains on the outside windows where he is living, and which said quarters consist of [fol. 20] three rooms, in one of which rooms the said three items of 150 cases of whiskey, 92 bags of whiskey and one five gallon can of alcohol were located.

That the thirty-three cases of gin were seized on the second floor of premises 609 West 46th Street. That the goods seized in said building 609 West 46th Street, belong to your deponent, who now lays claim to some, and asks that the said property be restored to him in the place whence they were taken.

That your deponent has a legal right to said goods because they were in the premises wherein he has his dwelling. Furthermore the search warrant does not provide for a search of premises 609 West 46th Street.

That the 6 five gallon jugs of whiskey, 33 cases gine, 102 quarts whiskey, 2 fifty gallon barrels of whiskey and the corking machine do not belong to your deponent, and he makes no claim for the same, which said articles were located in the adjoining building 611 West 46th Street.

An observation of the photograph submitted distinctly shows the separate and distinct character of both buildings; also the separate entrances to each, and the photograph of the third floor of 609 West 46th Street clearly shows the living quarters in which your deponent lives, and the rooms wherein he has his personal belongings as well as with Mr. Smith, his wife and child.

It is impossible to gain access to the upper part of the premises 609 West 46th Street by going into the building 611 West 46th Street.

John F. Steele.

Sworn to before me this 21st day of December, 1922. Bertha Biener, Commissioner of Deeds, City of New York, Residing in Boro of Brooklyn.

[fol. 21] (Indorsement on foregoing affidavit of John F. Steele:) Petition denied. 8/29/23. Saml. M. Hitchcock, United States Commissioner, Southern District of New York.

[fol. 22] UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

Before Samuel M. Hitchcock, Esq., United States Commissioner

MINUTES OF HEARING BEFORE U. S. COMMISSIONER

New York, July 24, 1923.

Appearances: William Hayward, Esq., United States Attorney, for the Government; H. Sanford Cohen, Assistant United States Attorney, of Counsel; Celler & Kraushaar, Esqrs., Attorneys for Petitioner; Meyer Kraushaar, Esq., of Counsel.

[fol. 23] COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Kraushaar: At the outset, Mr. Commissioner, allow me to state that this application is two-fold in character.

It is, first, to vacate and set aside the search warrant upon the ground that the affidavit upon which it was issued is entirely insufficient to comply with the provisions of the Espionage Law, and the search was clearly in violation of the Fourth Amendment to the Constitution of the United States.

In the event that the application is denied, the second ground is to controvert the search warrant, to show that the facts upon which it was obtained are false, that the description contained therein is mistaken, that the search was unlawfully made, in that the warrant called for a garage on certain premises and that the search was made in premises other than a garage.

On the first ground, I call the attention of the Commissioner to the affidavit upon which this search warrant was obtained. The affidavit was made by one Isidor Einstein, who is as familiar to your Honor as he is to other members of the Bar, and he says that on December 6, 1922, at about ten o'clock a. m., accompanied by agent Moe W. Smith, he was standing in front of a garage located in the [fol. 24] building at 611 West 46th Street, Manhattan, City of New York and Southern District of New York.

He says: "This building is used for business purposes only. I saw a small truck driven into the entrance of the garage, and I saw

the driver unload from the end of the truck a number of cases stencilled 'whiskey.' They were the size and appearance of whiskey cases, and I believe that they contained whiskey."

Now, in my judgment this affidavit is wholly insufficient to comply with the provisions of the law.

Mr. Cohen: Suppose you reserve all questions of law for the end of the case, because the Commissioner has already said that he is not going to set aside the warrant.

The Commissioner: I may not.

Mr. Kraushaar: I call your attention to the case of the United States against Casino, in 286 Federal Reporter 976, where Judge Learned Hand, in a case almost identical with the one at bar, vacated the search warrant. There the affidavit said, as here, that the prohibition officer saw a truck drive into the petitioner's place of business, and he believed that there was liquor therein. Upon that affidavit a search warrant was issued, and Judge Hand set aside the [fol. 25] warrant on the ground that this kind of proof was wholly insufficient.

The Commissioner: I recall that case very distinctly. It was a case which was taken up from me, and I read Judge Hand's opinion with a great deal of interest. The question of time there was one of the important elements in that decision, as I recall it, and I think there were a number of days elapsed—

Mr. Kraushaar: Two days had elapsed.

Mr. Einstein: Forty-eight hours.

The Commissioner: You mean in the Casino case?

Mr. Kraushaar: Yes, there was a lapse of two days' time.

Mr. Smith: It was on a Saturday, and the warrant was executed on Monday.

The Commissioner: In that case there was a certain amount of time which had elapsed—

Mr. Kraushaar: Yes, but I don't think, your Honor, that the case rested upon that basis alone.

The Commissioner: Oh, no, but he wrote a long opinion, and I recall it very well, because he and Judge Hough had disagreed in regard to some things, and are still in disagreement. It may be in the opinion itself, but Judge Hand at the time stated that he hoped there would be an appeal.

[fol. 26] Mr. Cohen: That is all.

The Commissioner: He told me that he hoped there would be an appeal before the higher court on the questions that he decided.

Mr. Kraushaar: If your Honor please, here in this case I fail to see the distinction. On the contrary, I think the Casino affidavit was much stronger than the one at bar. Here the witness says that he saw, in so many words, a number of cases being unloaded from a truck, but he does not say they were put into the garage.

Mr. Cohen: There is a substantial difference—

Mr. Kraushaar: Will you allow me to continue, please? I won't interrupt you, I promise you that. He says: "I saw a small truck driven into the entrance of the garage, and I saw the driver unload from the end of the truck a number of cases," which looked like whiskey and which were taken off the truck. He does not say that

the whiskey remained on the premises. He does not say that he saw the truck leave the premises without the whiskey cases. He doesn't know, but he says it looked to him like whiskey. There is no proof, no actual proof, that it was whiskey. It is entirely speculative on his part, and it seems to me that if search warrants can be obtained [fol. 27] upon such evidence as this, the effect of the prohibition inhibition, and the protection afforded to the citizens is effectually set at naught and is of no value at all; that it is clearly a violation—it is a clear and palpable violation of the citizen's constitutional rights.

The Commissioner: Section 5 of the Title 11 of the Act of June 13, 1917, provides that affidavits or depositions must set forth the facts tending to establish the grounds of the application for probable cause for believing that a violation exists. Now, I will have to say that I never have issued a search warrant except after careful examination of the affidavits and, as Mr. Cohen knows, I have from time to time sent back to the District Attorney various affidavits and have refused to issue warrants.

Now, this affidavit, to my mind, is quite within this provision of law, that it certainly tends to establish the grounds for the application and probable cause for believing that the violation exists.

Mr. Kraushaar: If you will allow me, Mr. Commissioner, I think you are quite as familiar with the authorities as I am, but I would like to refresh your memory a bit on some of the fundamental principles affecting this question. The courts have, from time to [fol. 28] time, set aside search warrants where the affidavits made upon information and belief did not sufficiently state the source of the grounds of belief or the source of the information was not stated.

The reason for that underlying rule was that even though the underlying affidavit did tend to prove that a crime was committed or that goods were in the possession of a man or on his premises for the purpose of violating the law, still mere information and belief was a mere conjecture. It was built on conjecture and nothing else and, for that reason, the source of the information and the grounds of belief must be stated.

And if it comes by reason of hearsay; if it is based on information derived from third parties, the information of the third parties must be produced or a satisfactory explanation given as to why it can not be produced.

Now, it seems to me that that fundamental rule applies equally as well where the witness does not say or does not use the term "information and belief," but where he says "I saw something entering the premises which looked like a case of whiskey, and I believe it is whiskey." That is a mere suspicion, it is a mere conjecture.

[fol. 29] The Commissioner: Why, it was marked "whiskey."

Mr. Kraushaar: Well, a case marked "whiskey" can still enter a man's premises and not be whiskey, and it seems to me that before a search warrant can be issued, there must be a reasonable attempt made to exclude any other possible inference except that the box which was unloaded somewhere contained whiskey, and also that it was unloaded in the garage and remained in that garage, without any further evidence or any other evidence.

It seems to me that such an affidavit as this is clearly evasive of the provisions of the Espionage Law, as well as the constitutional requirements.

The Commissioner: Well, I shall deny your motion in that regard.

Mr. Kraushaar: To which I respectfully except.

(Informal discussion off the record.)

ISIDOR EINSTEIN was called as a witness on behalf of the Government and, being first duly sworn, testified as follows:

Direct examination by Mr. Cohen:

Q. Are you attached to the Treasury Department——

A. Yes.

Q. And assigned to the enforcement of the National Prohibition [fol. 30] Act?

A. Yes, sir.

Q. Are you assigned to the office of the Federal Chief for the State of New York?

A. Yes, sir.

Q. Division No. 2?

A. Yes, sir.

Q. Were you so assigned on the 6th day of December, 1922?

A. Yes, sir.

Q. On that day did you visit premises on West 46th Street?

A. Yes, sir.

Q. What was the address?

A. 609 West 46th Street.

Q. Is that in the City of New York?

A. Yes, sir.

Q. Give a description of the building. What kind of a building is it?

A. This is a large structure, a brick building, with the appearance of a garage.

Q. Were there any names on the building?

A. There was some names, but I didn't notice the name of it at that time.

Q. Were there any numbers on the building?

[fol. 31] A. Yes, sir.

Q. What numbers?

A. 609 and 611, two numbers.

Q. That is on West 46th Street?

A. Yes, sir.

Q. Who was with you at the time you went there?

A. Agent Moe W. Smith.

Q. Where were you standing in relation to this garage—was it a garage?

A. Yes, sir.

Q. Where were you standing?

A. Just facing the entrance, on the other side of the street, on the sidewalk.

Q. Well, while you were there, what did you observe?

A. I saw a little truck, with no name on it, just drive into the garage.

Q. Did you see this truck go into the garage?

A. I did.

Q. How far in?

A. At the extreme end.

Q. You mean at the entrance or way at the back?

A. At the extreme end, at the back of the garage.

Q. Yes?

A. And, when the little truck got in there, I stepped a few feet [fol. 32] further, nearer to the garage, so that I could observe what is doing.

Q. And what did you see?

A. I saw the tail board being opened by one man—a certain man which I don't know who he is—and a minute later somebody else stepped over, and I saw cases, a number of cases, being unloaded there, and they were loading them on the other wagon right at the end.

Q. How far away were you?

A. At that time I was——

Q. What distance would you say, in feet?

A. I should say at that time—that was the time I crossed the street there and walked by—I was just about—you mean from the garage?

Q. From where you saw this wagon being unloaded, to the point where you were standing; how many feet was that?

A. At that time I was at the sidewalk.

Q. How many feet away would you say it was?

A. From the garage?

Q. From the place where this was unloaded.

A. Oh, I would say——

Q. Can you tell us the distance?

A. I would say it was twenty-five or thirty feet—about.

Q. Now, what did you observe as to those cases you saw being unloaded?

[fol. 33] A. I saw them put them out at the extreme end, which I later found——

Mr. Kraushaar: No, never mind that.

Q. What did you observe as to those cases? What were they marked?

A. The cases was marked "whiskey."

Q. That you saw?

A. Yes, I saw them unloaded.

Q. Did you make a search of the Federal Prohibition Director's office?

A. Immediately thereafter, I went back to the Prohibition De-

partment and looked over the records, to see whether those premises had a permit, but we couldn't locate any.

Q. Is there a permit for the possession——

A. No, sir.

Q. (Continuing:) —or manufacture or sale of intoxicating liquor at those premises?

A. No, sir.

Mr. Kraushaar: I move to strike out the answer on the ground that this is not proper proof. I think the witness should be qualified——

The Commissioner: Please read the question.

(Question read.)

Mr. Cohen: That is in the affidavit and sworn to.

[fol. 34] Mr. Kraushaar: I submit that is not proper proof, that the witness has not shown any proper qualification to testify that there is not any permit. It is not proper evidence, and it is secondary evidence, anyhow.

The Commissioner: If he says there is none, you can cross examine him on that. Objection overruled.

Mr. Kraushaar: I respectfully except.

By Mr. Cohen:

Q. What kind of a building is it?

A. It is a brick structure, with the appearance of a garage.

Q. Do you know for what purpose it is used?

Mr. Kraushaar: I object to that unless the witness is allowed to testify, or can say he knew, at the time he made the affidavit, what purpose it was used for.

Mr. Cohen: He was so sworn.

Mr. Kraushaar: Now, please don't put any words in his mouth.

The Commissioner: He has testified that it was used as a garage.

Mr. Cohen: Now, I want to offer proof from this witness, as part of the search warrant, just what was seized in those premises.

[fol. 35] By Mr. Cohen:

Q. You obtained a search warrant from Commissioner Hitchcock.

A. I then returned—I went to United States Commissioner Hitchcock for a search warrant.

Q. When you went there with a search warrant, did you see anyone there?

A. I did.

Q. Any person who is now present in court?

A. Later on, this person appeared (indicating), while the search went on. He was sent for.

Q. On whom did you serve a certified copy of the search warrant on?

A. On this man (indicating).

Mr. Kraushaar: Mr. Steele, you mean?

The Witness: Yes.

By Mr. Cohen:

Q. What did you seize?

A. I couldn't recollect, unless I saw the copy.

Mr. Kraushaar: And where did you seize it? That is important.

By Mr. Cohen:

Q. Where did you seize the liquors that you said you seized in your return (handing paper to witness).

[fol. 36] Mr. Kraushaar: That is not the return; that is my copy, but it is all right. Here is the original return (handing paper to counsel).

Mr. Mr. Cohen:

Q. There is your original (handing paper to witness).

A. 150 cases of whiskey—

(Informal discussion off the record.)

Q. When you came with the search warrant, to what part of the building did you go first?

A. To the same place where I saw the liquor being unloaded.

Q. That is, on the street floor?

A. Yes, sir.

Q. Did you find any liquor there?

A. I did not.

Q. Where did you go from there?

A. On the elevator, one flight up.

Q. Where is the elevator?

A. In the center of the garage.

Q. At the front or rear?

A. In the rear.

Mr. Kraushaar: Just a minute. May I, at this point, ask permission to interrogate the witness?

Mr. Cohen: Wait until I get through.

Mr. Kraushaar: All right.

Q. Then you went into the elevator, and you went up how many [fol. 37] floors?

A. Two floors.

Q. You went up two floors, or you went up one floor, which?

A. One—to the second floor.

Q. And you got out of the elevator?

A. Yes, sir.

Q. Where did you go after you got out of the elevator?

A. Right on the same floor.

Q. But where did you go, what part?

A. On the right side, on my right side as I entered.

Q. How did you get in?

A. I got up on the elevator.

Q. I mean where did you go?

A. When I got upon the elevator, I saw on my right hand side there, three men filling up bottles of whiskey and bagging whiskey.

Q. Now, the place you found that, was that enclosed in a little room?

A. That was enclosed in a little room, partitioned off on my right hand side.

Q. Was there a door to it?

A. There was a door to that.

Q. Was that door open?

A. It was.

[fol. 38] Q. Did you have to throw it down or break it in?

A. No, sir.

Q. Were those three men working there at the time?

A. They were filling up bottles at the time.

Q. Where else did you go on that floor, if anywhere?

A. In the rear, on the same side, to the front there were 33 cases of gin.

Q. When you say "on the same side," which side do you mean?

A. On the same floor I mean.

Q. On which side?

A. On the left hand side.

Q. Was this in an enclosed space?

A. It was in an enclosed place.

Q. Was that locked?

A. It was.

Q. Did you break the lock?

A. No, sir. A fellow by the name of Smith, which is the caretaker of the garage, opened it for us.

Q. Now, when you got through there, where did you go next?

A. On the floor above.

Q. How did you get there?

A. On the same elevator.

Q. Where did you go?

[fol. 39] A. To the front of the building, facing the street.

Q. And what did you find there?

A. 92 bags of whiskey, and 150 cases of whiskey.

Q. Where were those located? Were they enclosed in a room?

A. It was also in a closed room, on the same floor.

Q. How did you get in there?

A. The door was open.

Q. The door was open?

A. Yes.

Q. And you went in?

A. Yes, sir.

Q. Is that all that was seized in those premises? Is that all that was seized?

A. That is all that I can remember. 1 corking machine was seized also.

Q. Where was that seized?

A. On the floor above—below, I mean.

Q. One floor above the street?

A. Yes.

Q. Now, in describing the premises, how many entrances are there to this building on 46th Street? On the street floor what kind of entrances are there?

A. Large doors for the cars to drive in.

Q. Now, did you go up any stairs at all in the building?

[fol. 40] A. I did not.

Q. Did you investigate or look through that building to find any staircase?

A. I did.

Q. Where?

A. On the right hand side of the building there was some stairs, but it was partitioned of- or is, what you call it, dead—never been used.

Q. Did you find any other stairway?

A. I did.

Q. Where was that?

A. On the left hand side.

Q. Was that closed?

A. Which would indicate 611.

Q. Was that closed?

A. (No response.)

Q. Was that closed in any way?

A. It was not.

Q. Was that in use, or could be used?

A. Yes.

Mr. Kraushaar: Please don't prompt the witness, Mr. Smith.

Mr. Smith: I am not.

Q. Both of these stairways which you have just described are on [fol. 41] 46th Street?

A. Yes, sir.

Q. And, between those two, are the entrances to the garage, as you have already described?

A. Yes, sir.

Q. Now, is there any partition separating this building on the street floor?

A. No, sir.

Q. Is there any partition on the second floor?

A. No, sir; outside of beams supporting the building.

Q. Can you have free access on the second floor to all parts of that floor?

A. Yes, sir.

Q. That is, after you get off the elevator?

A. Right at the elevator.

Q. Are there any partitions on the third floor?

A. No, sir, outside of the beams supporting the building.

Q. When you say "partitions," are there any separating partitions dividing the building on the ground floor in the front or rear?

A. No, sir. I could stand in the center and look around freely all over the building.

Q. Is there any part of the building which is enclosed for living purposes, that you discovered after you got there?

[fol. 42] A. On the third floor I found there a little cot, and this was questioned by me, "Who is there, who occupies it," at that time.

Q. Well, did you find out who occupied it?

A. I did.

Q. Who?

A. This man Smith which led us upstairs. He told us that he is the caretaker for Mr. Steele.

Q. Who does he live there with?

Mr. Kraushaar: I move to strike out that "he told us he is the caretaker," on the ground it is hearsay.

The Commissioner: Strike it out.

Q. Did you see any other persons about the building?

A. Yes, sir.

Q. Who?

A. I saw some woman up there.

Q. Where?

A. Right at the front.

Q. Do you know who that woman is, or were you told?

A. I do not.

Q. What did you do with this liquor that you seized?

A. I seized that liquor and took it to the Knickerbocker Warehouse, where Mr. Steele appeared later on. I served a copy of the search warrant on him. I asked Mr. Steele his place of business, [fol. 43] and Mr. Steele told me that he lives on 34th Street, I don't remember the number, and he told me that the garage and the liquor belongs to him.

Mr. Cohen: That is all.

Cross-examination by Mr. Kraushaar:

Q. Mr. Einstein, did you ever enter this building before you obtained a search warrant?

A. Never in my life.

Q. Before you obtained the search warrant, your sole familiarity with this building was its outward appearance?

A. Sir?

Q. I say, your only knowledge of this building was its outward appearance, at the time you obtained the search warrant?

A. From the outside, at the entrance of the garage, I saw some cars—

Mr. Kraushaar: I move to strike out the answer and ask that the witness be directed to answer the question.

The Commissioner: Read the question, please.

Q. (Question read.)

A. I don't understand that question.

Q. All you knew about this building, before you obtained the search warrant, is what you observed while standing outside of it? [fol. 44]

A. First, outside, yes, sir.

Q. Now, it is an easy matter to answer the questions——

Mr. Cohen: He said "Yes." He answered that it was.

By Mr. Kraushaar:

Q. Now, before you obtained the search warrant, you examined the outside of this building?

A. In what way?

Q. Did you look at the signs on the building?

A. I did.

Q. Is this a photograph of the building as it appeared to you on the day that you obtained the search warrant—the front part of the building?

A. I don't remember.

Q. Is that the best answer you can give, Mr. Einstein, that you cannot remember it?

A. That is the best answer I can give, in regards to this picture.

Mr. Kraushaar: I ask that the picture be marked for identification.

The Commissioner: I presume it will be conceded that it is a photograph of the building?

Mr. Kraushaar: Is that a photograph of the building, Mr. Cohen?

Mr. Cohen: The probabilities are that I will concede it is a photograph, except for the snow on the ground and the crayon numbers on the doors.

Mr. Kraushaar: That is the only difference?

Mr. Cohen: Yes.

Mr. Kraushaar: That is correct. I offer it in evidence.

The Commissioner: It may be received.

(The photograph was received in evidence and marked "Petitioner's Exhibit No. 1, July 24, 1923.")

Mr. Cohen: Except that I don't know whether the curtains were there, the curtains on the windows on the second floor.

By Mr. Kraushaar:

Q. In the application for the search warrant, you described the building as a garage at No. 611 West 46th Street, New York City?

A. Yes.

Q. Where did you get the number from?

A. I remembered it.

Q. In other words, you looked at the building to see what numbers were on it?

A. I certainly did.

Q. Didn't you also see the number 609 on the building?

A. I didn't look for the other number. This number was sufficient for me.

[fol. 46] Q. This number was sufficient for you?

A. It was sufficient for me, for the building.

Q. Now, I call your attention, Mr. Einstein, to the fact that on this building there are two large entrances; do you observe that?

A. I do.

Q. Did you observe that at the time you made your application for the search warrant?

A. I did.

Q. Now, into which of the entrances did this vehicle go that you have described?

Mr. Cohen: You mean automobile?

Mr. Kraushaar: I said "vehicle." If he doesn't understand that term, I will explain it.

A. 611.

Q. You saw the vehicle enter the premises at 611?

A. Yes.

Q. Now, did you at that time realize that this building was two separate buildings?

A. I did not. I could only see one.

Q. You saw the number 609, didn't you?

A. I didn't take notice of the other numbers; just the numbers that it was necessary to take.

Q. Now, Mr. Einstein, you swore in your affidavit, didn't you, [fol. 47] that this building was used solely for business purposes?

A. I did.

Q. That was not true, was it?

A. That was.

Q. Well, as a matter of fact, you did find Mr. Smith living upstairs, didn't you?

A. No, I didn't find Mr. Smith living upstairs. I did not so testify.

Q. Didn't you testify that you found a number of women in the building?

A. I found a drunken woman up there, but I didn't find her living in the building.

Mr. Kraushaar: I move to strike that out.

The Commissioner: Strike out the word "drunken."

Q. Did you see a woman there?

A. I did see a woman.

Q. Didn't you find any beds in the building?

A. I saw a cot.

Q. How many cots?

A. One.

Q. Did you see a kitchen in the building?

A. No, sir.

Q. Did you go into the room where this cot was?

A. I did.

Q. Didn't you see any kitchen utensils there?

[fol. 48] A. I didn't pay no attention.

Q. Didn't you see a table there and a place to sit down?

A. I did notice a little table, yes.

Q. Didn't you see any plates or spoons or anything like that?

A. I was looking for whiskey, I wasn't looking for spoons.

Q. I see. That did not make any impression on your mind, the cot that was there?

A. It did not.

Q. Now, how came you, Mr. Einstein, to swear that this building was used solely for business purposes, without having entered the building to see what the building actually was used for?

A. Well, my answer is that I saw two automobiles all at once being fixed, at the time when I was watching the whiskey being unloaded, and I looked at the building and it didn't look as *it* anybody would live there; it looked just like an old structure, like a garage, and my judgment was that no man would live there, that nobody would live there, and nobody did live there, and——

Mr. Kraushaar: Wait a minute. I move to strike that out.

The Witness: That is my answer.

Q. In other words, when you looked at the building you assumed [fol. 49] that it was a building which was used purely for business purposes, but you had no knowledge of your own on the subject at the time you made this application for the search warrant?

Mr. Cohen: That is objected to.

The Commissioner: He may answer.

Mr. Cohen: He says "You assumed," and from that assumption——

The Commissioner: Please read the question.

(Question read.)

The Commissioner: He may answer.

The Witness: It so appeared to me, from the appearance of the building.

Q. But you did not actually know, did you?

A. I was never in the building before in my life.

Q. Now, did you observe a sign on this building at that time, reading as follows: "Indian Head Auto Truck Service, Indian Head Storage Warehouse?" Did you see that sign on the building?

A. I didn't take notice of that.

Q. You didn't notice that at all?

A. I did not.

Q. But you did take notice of the fact that there were signs on the building?

A. Numbers. I was looking for the number.

[fol. 50] Q. Didn't you testify on your direct examination, in answer to a question asked of you by Mr. Cohen, that you did see signs on the building, but that you did not remember exactly what they were?

A. I say I didn't remember of any signs. I didn't read them signs.

Q. Do you mean to testify that, when you were asked that question by Mr. Cohen, you meant to testify that you did not remember whether there were signs there or not, or that there were signs, but that you did not remember what they were?

A. I didn't pay no attention to any signs, outside of the number of the building, which I was interested in.

Q. How many search warrants have you obtained since you have been a Federal Prohibition Agent?

A. Oh, maybe 1,500.

Q. And you have learned, haven't you, in your experience, that there is such a thing as a constitutional provision against wrongful searches and seizures?

A. I have.

Q. And you understand, do you not, Mr. Einstein, that it is a serious thing to obtain a search warrant against a citizen?

A. Not when the evidence is there.

Q. Excuse me, but you understand, don't you, Mr. Einstein that [fol. 51] it is a serious matter to obtain a search warrant—serious against a citizen?

A. Not when the evidence is there.

Mr. Kraushaar: May I ask, Mr. Commissioner, that the witness be directed to answer that question?

Mr. Smith: I think that is an answer, Mr. Commissioner.

The Commissioner: Wait a minute, you are not the counsel. Of course, you can insist upon an answer to the question, but I don't see how that is very material.

Mr. Kraushaar: It goes to the credibility of the witness, and I want to show that the witness knows the importance of obtaining a search warrant, and, if he did so in the manner he testified, he did so recklessly and without the proper basis—

The Commissioner: Of course I do not want to limit you in any way in your cross examination, but I don't see the importance of that.

Read the question, please.

(Question read.)

The Commissioner: He may answer that.

The Witness: My answer is that it is not serious at all, if I see a violation and the evidence is there. It is not serious at all; that is my duty.

[fol. 52] By Mr. Kraushaar:

Q. In other words, if you have the evidence and you know of a violation—

A. It is my duty to get a search warrant and seize the liquor.

By the Commissioner:

Q. I don't think you understand the question.

A. I do not, Mr. Commissioner.

Q. His intention is to ask you whether the taking out of a search warrant is not a serious matter.

A. Taking out a search warrant?

Q. Yes. Whether an application for a search warrant is not a serious matter.

A. My answer is, Mr. Commissioner, that I don't consider it serious if I see a violation. It is my duty, if I see a violation.

Q. I am not asking you that, but the question is whether the taking out of a search warrant is not a serious matter.

Mr. Kraushaar: Serious, perhaps, to the defendant or a person from whom property is taken.

A. My answer is that if I see a violation, I don't consider it serious to come and give my evidence here before the Commissioner and a get a warrant.

By Mr. Kraushaar:

[fol. 53] Q. In other words, the rights of the individual citizen, as far as the Constitution mean nothing, if you think you see a violation of the law being committed?

A. If the law is violated, it is my duty to go and get a search warrant and make a seizure.

Q. Now, how long have you been a resident of the City of New York?

A. Oh, for nine years.

Q. You are familiar, are you not, with the Tenement House laws?

A. I am not.

Q. You know, do you not, that where a building is used for dwelling purposes and contains more than three dwellings, that the law requires fire escapes to be on the property?

A. I am not acquainted with the Fire Department rules.

Q. You don't know anything about that?

A. No, I do not.

Q. You know, do you not, that a warehouse does not require fire escapes?

A. I don't know anything about those laws.

Q. I show you this photograph again and ask you to observe whether or not there are fire escapes on this building.

A. I don't remember whether I saw them at that time or not.

[fol. 54] Q. You didn't observe that proposition?

A. I answered that question before.

Q. That is the best answer you can make?

A. I said I didn't see any fire escapes.

Q. Now, did you observe whether there were any curtains on the second floor, at that time?

A. I didn't observe them either.

Q. But you do say that you saw a truck enter this place and, the ground floor being used as a garage, you assumed that the whole building was used for garage purposes?

A. I did not so testify.

Q. Did you assume that the whole building was used for garage purposes?

A. I testified a while ago that after I saw the liquor being unloaded, I looked the building over and it appeared to me to be a garage, not a private dwelling—the appearance—and I so testified.

Q. Didn't it appear to you that the first, second and third stories might have been used for warehouse purposes?

A. If it was used for warehouse purposes, the whiskey was illegally held there, anyway.

Mr. Kraushaar: I move to strike the answer out as not responsive.

The Commissioner: Strike it out.

[fol. 55] Mr. Kraushaar: Will you please read the question?

Q. (Question read.)

A. It may have been used for a warehouse, and maybe not.

Q. And yet you described the entire premises as a garage at 611 West 46th Street?

A. As I said, it had the appearance of a garage. I saw machines up there.

Q. Well, now, Mr. Einstein, if you had gotten a search warrant to search a building or a tenement house at 611 West 46th Street, and that tenement house contained six or seven different apartments with various occupants in that house, would you search each and every one of those apartments?

A. I would not search a private house, but in a garage where the whole building—

Q. Let me ask you this question: If you got a search warrant, Mr. Einstein, against a garage at 611 West 46th Street, and the lower portion of the premises were used as a garage, while the upper parts were rented out to various owners, rented out to different people and used for different purposes, would you search the upper floors of that building, the upper parts of the building?

A. I don't think I have to answer that question. Let the Commissioner say.

[fol. 56] Mr. Smith: He don't know what he would do in any other place.

The Commissioner: Let me hear that question again.

(Question read.)

The Commissioner: I think you are asking a hypothetical question, Mr. Kraushaar.

Mr. Kraushaar: Very good, I will withdraw it.

The Commissioner: We are concerned solely with what happened in this case.

By Mr. Kraushaar:

Q. Now, as a matter of fact, Mr. Einstein, the first floor of this building was not used as a garage, was it—the floor above the ground floor?

A. It was—the first floor, is that what you mean?

Q. The ground floor of the garage?

A. It was.

Q. And the second floor, was that used as a garage?

A. I didn't find any automobiles up there, I found whiskey.

Q. Did you find anything up there—anything like automobiles on the first floor?

A. I found no machines.

Q. You mean, by "machines," automobiles?

A. Automobiles.

[fol. 57] Q. Outside of the whiskey, what did you find on the first floor?

A. I didn't see any there.

Q. The first floor, as a matter of fact, was used as a warehouse, wasn't it?

A. No, sir.

Q. Wasn't it used for the storage of goods?

A. I couldn't see anything.

Q. In other words, it was entirely empty at that time?

A. It wasn't entirely empty, no, sir.

Q. Now, this elevator that you saw there on the premises on the day you made your search, was that the kind of an elevator which is used in a garage?

A. It is an elevator, but I don't know if it was the kind of an elevator used in a garage.

Q. Well, was that elevator big enough to carry a machine going upstairs?

A. Why—

Q. By "machine" I mean a motor vehicle.

A. A machine could get on.

Q. How big a machine could get on that elevator?

A. I wouldn't want to say.

Q. You didn't see any machines going upstairs, did you?

A. What I saw was the whiskey.

Mr. Kraushaar: I move to strike out "what I saw was the [fol. 58] whiskey."

The Commissioner: Strike it out.

By Mr. Kraushaar:

Q. Didn't you see any barrels on the first floor?

A. What do you call the first floor? You mean the ground floor?

Q. No, the floor above the ground floor.

A. Well, that is the second floor.

Q. All right, we will call it the second floor.

A. Yes.

Q. Barrels containing whiskey?

A. Yes.

Q. Did you seize any barrels containing whiskey?

A. Yes, sir.

Q. Did you see any other barrels, outside of the whiskey barrels?

A. I don't remember any other barrels. I just remember what I took.

Q. I show you this photograph and ask you whether that is a photograph of the second floor?

A. I don't think so.

Q. You don't think so?

A. No, sir.

Mr. Kraushaar: I ask that it be marked for identification.

[fol. 59] (The photograph was thereupon marked Petitioner's Exhibit No. 2, for identification, July 24, 1923.)

By Mr. Kraushaar:

Q. Now, when you testified on your direct examination that when you were in the garage, or when you looked into the garage, you could see every part of the building, you did not mean exactly that, did you?

A. I testified, if I recall, that I could stand——

Q. You mean on the second floor?

A. No, that you could stand in the garage on the first floor and that you could see every other part of the building.

Q. You mean the floor above?

A. Yes.

Q. The second floor?

A. Getting off the elevator—that is the only entrance we used—I could look through the whole building, yes sir, with the exception of a lot of pillars supporting the building.

By the Commissioner:

Q. Do you mean the whole building or through that floor?

A. Through the whole floor, through the entire building outside of——

Q. On that floor?

[fol. 60] A. On that floor.

Q. You could not see through the ceiling, of course?

A. No sir, you could not.

Q. You could see around that floor?

A. Yes, sir.

By Mr. Kraushaar:

Q. Now, you say that there was no dividing partition anywhere on those upper floors of the building?

The Commissioner: He did not say that.

Q. No. Were there any dividing partitions?

A. Why, at the extreme end, probably at the corner, there were certain little rooms, which you call, partitioned off—the middle part of the building, but you could look through, all over.

Q. Right through the middle of the building didn't there run cross beams which were supported by pillars?

A. Yes.

Q. And weren't those cross beams partitioned off by means of a partition?

A. They were not.

Q. I show you this photograph and ask you whether that is not a photograph of one of the upper floors of that building?

A. What floor do you mean?

Q. The third floor.

[fol. 61] A. The third floor? It didn't appear to me to be in the same condition as it is now.

Q. Well, is that substantially a photograph of the third floor?

A. I say it may be, and it may not be, but it doesn't look to me like it looked.

Q. Is your memory good, Mr. Einstein?

A. It is pretty fair.

Mr. Kraushaar: All right, I will offer that photograph in evidence.

(Photograph received in evidence and marked Petitioner's Exhibit No. 3, July 24, 1923.)

By Mr. Kraushaar:

Q. I show you another photograph, Mr. Einstein, and I ask you whether or not that is a photograph of part of the third floor of that building?

A. I cannot recall that.

Mr. Kraushaar: I ask to have that marked for identification.

(Photograph was thereupon marked Petitioner's Exhibit No. 4 for identification, July 24, 1923.)

By Mr. Kraushaar:

Q. I show you this photograph, Mr. Einstein, and ask you whether that is not a photograph of part of the second floor of that building?

[fol. 62] A. It didn't appear to me in that condition.

Q. What do you mean by not appearing to you in that condition?

A. I mean it didn't look that way when I was there, that is what I mean.

Q. Well now, let me ask you this: This portion which I point my finger at now on that photograph, is the elevator, isn't it?

A. I think it is, but I wouldn't be sure. It looks like it.

Q. And isn't that a wall (indicating) which divides off the two buildings outside of the elevator?

A. There was no wall at all at the time, I could look through the whole building.

Q. I see.

Mr. Kraushaar: I ask to have that marked for identification.

(Photograph was thereupon marked Petitioner's Exhibit No. 5 for identification, July 24, 1923.)

By Mr. Kraushaar:

Q. I will show you this photograph and ask you whether or not that is a photograph of the top floor of that building?

Mr. Kraushaar: Please don't prompt him, Mr. Smith. You will have your chance later.

Mr. Smith: I am not prompting him.

[fol. 63] A. I think it is. I recognize the woman.

Mr. Kraushaar: I offer that photograph in -dence.

(The photograph was received in evidence and marked Petitioner's Exhibit No. 6, July 24, 1923.)

By Mr. Kraushaar:

Q. Mr. Einstein, I call your attention to this photograph. This room here (indicating) where the lady stands, is the dwelling quarters, isn't it—the place where the people lived?

A. No, I testified here before that it was a room where I found the cot.

Q. That is where the people lived—Mr. Brown and his wife?

A. I didn't so testify.

Q. Isn't that the truth?

A. I didn't so testify.

Q. Well, isn't it the truth that they lived there?

A. I didn't testify that they lived there.

Q. Were there any living apartments there?

A. I don't know whether there is or not. I found a cot in a little room up there.

Q. Now, I show you these two photographs and ask you whether or not these are not the entrances to the so-called part of the garage part of that building?

[fol. 64] A. I don't remember any such markings as these (indicating).

Q. Outside of the markings—the markings being 609 and 611—

A. I don't remember those.

Q. Now, are these diagrams here which are in the possession of Mr. Smith—do they represent diagrams of the building at the time you visited it or entered it after the search warrant was obtained?

A. Yes, sir.

Q. These diagrams were made by Mr. Smith, your associate, after you went in there and searched the premises and found this liquor?

A. They were, yes.

Mr. Kraushaar: I offer these three papers in evidence.

(The papers were received in evidence and marked Petitioner's Exhibit No. 7, July 24, 1923.)

Mr. Kraushaar: That is all, no further cross examination.

I offer these two photographs in evidence, with the concession that the crayon figures 609 on one—

Mr. Cohen: With the correction that the crayon figures 609 on one of them were not there at the time of the visit, nor was the door open as shown on that same picture, but that the true photograph [fol. 65] would be as depicted on Exhibit No. 1.

Mr. Kraushaar: Will that be marked as an exhibit?

The Commissioner: That may be received in evidence.

(The photograph was received in evidence and marked Petitioner's Exhibit No. 8, July 24, 1923.)

Mr. Kraushaar: And the other photograph, which will be exhibit No. 9, is admitted by consent, with the exception that the figures 611 in crayon were not there at that time.

(The photograph was received in evidence and marked Petitioner's Exhibit No. 9, July 24, 1923.)

Mr. Kraushaar: Exhibits Nos. 2, 3 and 4 for identification, are they concededly a fair description of the interior of the building—

Mr. Smith: No, I have testified that they didn't look like that at the time.

Mr. Kraushaar: All right.

MOE SMITH was called as a witness on behalf of the government and, being first duly sworn, testified as follows:

Mr. Cohen: It is conceded that Moe W. Smith will testify on direct examination to the same effect as the witness Isidor Einstein, with this exception:

[fol. 66] Direct examination by Mr. Cohen:

Q. Did you prepare these three papers?

Mr. Kraushaar: You are referring to Petitioner's Exhibit No. 7?

Mr. Cohen: Yes.

A. Yes, sir.

(Whereupon and adjournment was taken until to-morrow, Wednesday, July 25, 1923, at 2:00 P. M.)

[fol. 67] UNITED STATES OF AMERICA, SOUTHERN DISTRICT OF
NEW YORK

In the Matter of the Application of JOHN F. STEELE to Vacate a
Search Warrant and to Controvert the Same

Before Samuel M. Hitchcock, Esq., United States Commissioner

New York, July 25, 1923.

William Hayward, Esq., United States Attorney, for the Govern-
ment; H. Sanford Cohen, Esq., Assistant United States Attorney,
of Counsel.

Celler & Kraushaar, Esqrs., Attorneys for Petitioner; Meyer
Kraushaar, Esq., of Counsel.

[fol. 68] MOE W. SMITH resumed the stand and testified as
follows:

Direct examination (continued).

By Mr. Cohen:

Q. Mr. Smith, are you an employee and agent of the United
States, attached to the Internal Revenue Department?

A. Yes.

Q. In the enforcement of the National Prohibition Act?

A. I am.

Q. Were you so engaged in the month of December, 1922?

A. I was.

Q. Did you, on December 6, 1922, visit the premises at 611 West
46th Street?

A. I did.

Q. In the City of New York?

A. Yes.

Q. Will you state what kind of a building that is?

A. It is a four story brick building, the ground floor occupied as a
garage.

Q. That is what you first saw when you went there?

A. I did.

Q. How large a building is it? What frontage, if you know?

A. It covers two plots, two buildings—609 and 611 West 46th
Street.

[fol. 69] Q. How many doors are there?

A. Four doors, all told; two smaller doors and two garage doors.

Q. The two garage doors are large enough for an automobile
to enter?

A. They are.

Q. Now, the easterly door is—

A. No. 609.

Q. I will withdraw that. Can you enter the building by the

easterly door, the most easterly door, other than the two garage doors?

A. You cannot.

Q. Can you enter the building by the westerly door?

A. You can.

Q. What kind of an entrance is that?

A. About a four foot entrance to a stairway leading upstairs.

Q. Now, you were there on the outside of the building on that day at what time?

A. Sometime in the morning, about nine something. I don't know just what time it was, but it was early in the morning.

Q. And who was with you?

A. Agent Einstein.

Q. What did you or agent Einstein do, if you know?

[fol. 70] A. We stood practically opposite the building and we observed a car going into the automobile door entrance at 611. Agent Einstein then left me and went across the street. I walked east and agent Einstein then later met me. I stayed on the corner while agent Einstein went away, and watched this building.

Q. Did you observe anything?

A. I observed a small motor truck going into this here garage entrance and then I walked down towards Eleventh Avenue.

Q. What did you do after that?

A. I waited for Agent Einstein's return.

Q. Where were you standing?

A. On the corner of Eleventh Avenue and 46th Street. I walked across the street and back to the other side of Eleventh Avenue.

Q. Did you have the building under observation while you were there?

A. Well, not at all times.

Q. Then agent Einstein came back?

A. Yes.

Q. When did he come back?

A. I should judge in about an hour and a half or so.

Q. What did he have?

A. He had with him a search warrant for the building that we [fol. 71] observed.

Q. That search warrant was issued on the 6th day of December, 1922?

A. Yes.

Q. And these premises you say are in the City of New York?

A. They are.

Q. Then what did you do.

A. We entered the premises and we first met a man, which we later found out to be the caretaker. He said his name was Smith.

We told him that we had a warrant, a search warrant to search the entire building. He at first objected and then we told him that we wanted to search the building. We searched the ground floor, which is an open floor covering the both plots, and we found nothing there at all. We then asked Smith to take us up on the first floor of the building. He had the key to the elevator, and he started the

elevator and took us up in the elevator to the first floor. This elevator is in the rear of the building, and we got off at the—the floor which is known as the second floor in this hearing—we got off and there is an opening which led into another part where there was three men who were filling bottles of amber colored fluid from filters and jugs. These men were in an enclosure. I should guess the enclosure was about twenty-five feet, partitioned off in this here building, and this was on the 611 side.

[fol. 72] Q. What did you find there?

A. We found a corking and whiskey bottling machine, one hundred and three quarts of whiskey, one corking machine, and two barrels of whisky, and six five gallon jugs of whiskey.

Q. What did you do then, where did you go?

A. From there we went back to the elevator side again, and we went to the front of the building which is known as 609, and we observed another room that was partitioned off in this here place, and it was locked. We asked this—that was in the front of the building, 609—we asked this man Smith about the keys for the lock. He then produced some keys and opened that closet, and then we found 33 cases of gin.

By the Commissioner:

Q. Before you get that far, what was there between where you were—

A. We entered this here place and there was an opening there, and we found nothing between this here opening where I had entered, but there was beams running across and some partitions in different parts of the building running from the rear to the front.

Q. Well, could you get access from where you were to those other places, without breaking down anything?

[fol. 73] A. We had free access at all times, without breaking anything down in the entire building.

By Mr. Cohen:

Q. Then where did you go?

A. From there we went to the next floor.

Q. You went by the elevator?

A. By the elevator. This same man Smith had taken us to the elevator and up to the next floor, and in the front of the building, which is the street side, we found another room that was partitioned off, in No. 609, which I called a store room, which had a door leading from—after getting off the elevator, a door that lead into this here room, and in that room we found ninety-two bags of whiskey and one hundred and fifty cases of whiskey. Those cases and bags bore no tax paid labels at all.

By the Commissioner:

Q. Now, on that floor were there any partitions separating—

A. There was in some part of it, not all of it. I believe in the part where we got off the elevator, there was some sort of a partition.

Q. Well, could you go all over the entire floor without breaking down anything?

A. Why, we never went through there at all. I didn't observe that, because we never went into that part of it at all. We stayed [fol. 74] in the 609 premises, because there was a gate there and they had that part locked so I didn't step in there at all.

Q. So you did not go into 611 at all?

A. I did not.

Q. Is there a living apartment there?

A. Well, there is a room there, which I asked this fellow Smith about, and he said that he had lived there as the watchman with his wife, and then I asked them how about the liquor. I said "How about this liquor, does it belong to you," and he said "It does not." I asked him, "who does it belong to," and he says, "it belongs to a different man"——

Mr. Kraushaar: I move to strike that out.

The Commissioner: I think that is hearsay.

Mr. Cohen: No, I think that is proper.

Q. Now, tell me about this living room. What was there in that room?

A. I observed just sort of a room that had a cot in it, some tables, and it had some other things there, and there was some men who were working downstairs, sitting up there at that time in that room.

Q. Was there a sink there at all?

A. I didn't observe that at all.

Q. Was there a bathroom?

[fol. 75] A. No, sir.

Q. Was there any arrangement for bathing in anyway or washing things?

A. I didn't observe it. It might have been there, but I didn't observe it.

Q. It was simply one room?

A. That is all I saw.

By Mr. Cohen:

Q. Now, this liquor which you took on that floor was not in this living room, was it?

A. It was not.

Q. It was in a different room?

A. Entirely different from these premises.

Q. And these partitions making up this living room, were they plastered partitions?

A. The partition was not.

Q. How was it partitioned off?

A. It was boarded.

Q. Were the boards close together or were they separated?

A. Well, they were close together.

Q. Was it done, from what you observed, so that it might have been regular carpenter work or was it done temporarily?

A. Well, it was sort of a rough job, just stuck up, as I recall it.

Mr. Cohen: That is all.

[fol. 76] Cross-examination by Mr. Kraushaar:

Q. Mr. Smith, Petitioner's Exhibit No. 1 is a fair description of the property—it is a photograph of the property as it looked at or about the time you made this seizure?

A. It is, with the exception, I believe, of the 609 and 611, which is crayoned on the bottom floor, and the first floor of the building.

Q. But the sign——

A. I don't remember the sign.

Q. The sign "Indian Head Auto Truck Service, Indian Head Storage Warehouse, 609 and 611," was there at that time?

A. I believe it was. I didn't take notice of that.

Q. But you did see two numbers on this building before the seizure was made, 609 and 611?

A. I don't remember whether I did or not. I didn't observe that, because agent Einstein took that, and I didn't bother with it, because I knew he was going for the warrant.

Q. You didn't see any whiskey on this wagon before it entered the garage?

A. I saw some boxes, but I didn't observe the stenciling, because I stayed directly opposite and then left for the corner after agent Einstein had crossed the street.

Q. And you did not see that there was anything stenciled on [fol. 77] the boxes at all?

A. I did not. As I said, I had left the spot where I was standing, after I saw the truck enter the garage and I went towards Eleventh Avenue.

Q. Did you know, before you obtained the search warrant, whether 611 or 609 were two separate buildings?

The Commissioner: He did not obtain the search warrant.

Q. Well, before the search warrant was obtained, did you know whether it was one building or two buildings?

A. I knew what the ground floor was.

Q. The ground floor was an open space?

A. One open space.

Q. Did you look into the building?

A. I didn't see, from where I was standing, but one ground floor, with no partitions.

Q. Did you see any automobiles downstairs?

A. I believe there was one or two, I don't know.

Q. Now, this building or these buildings have two separate entrances, haven't they?

A. In what respect?

Q. Well, 611 has this large garage entrance, hasn't it?

A. They both have large doors, either one.

Q. And you can get in through either one?

[fol. 78] A. Yes.

Q. Now, 611 has a door which would indicate a private entrance to a stairway, hasn't it?

A. It has, I came down——

Q. And 609 would seem to indicate that there was a stairway from the outside?

A. 609 had a door outside, which I saw, but that was nailed up.

Q. But you didn't know whether there was a stairway leading from that door or otherwise, the first time you inspected the building?

A. The first time I inspected the building was when I entered with the search warrant.

Q. I see, but from the outside it gave you the impression that there was a stairway leading up into the house?

A. I couldn't tell you. It might have led into the garage, for all I knew at that time.

[fol. 79] Q. Now, you made this drawing, Petitioner's Exhibit No. 7?

A. I did make that.

Q. Did you search the top floor of the building at all?

A. I did—if that is the top floor (indicating).

Q. Well, I call your attention to the fact that there are only three pieces of paper here, one reading "open space used for garage," one marked "second floor," and one marked "third floor."

A. If there is any floor above that, I don't know. I only made a drawing of the places that we entered.

Q. You don't know what is on the top floor?

A. I don't know whether there is a top floor or not. There may be, I don't know.

Q. I show you a photograph and call your attention to the fact that there are four stories to the building, the ground floor and three additional stories.

A. This is as high as I went, where the photograph indicates these curtains.

Q. Do you know whether those curtains were there at the time you made your inspection of the building, the first time?

A. They were not.

Q. That is, you believe they were not?

A. Positive.

[fol. 80] Q. Now, you saw, did you not, the part of the building in which the dwelling quarters of the watchman are?

A. It was supposed to be, yes.

Q. Well, I mean when you got upstairs, did you find dwelling quarters around the windows indicated by the curtains?

Q. Whether I found the windows there?

Q. Whether the room in which the watchman lived was that room, or did these windows with the curtains border on that room?

A. Well, that I really don't know, because I didn't go inside and look out to see whether those were the windows.

Q. Was the dwelling room on that side of the house?

A. It was.

Q. Now, Petitioner's Exhibit No. 7 is in your own handwriting, isn't it?

A. It is.

Q. And every word of it, the printing and writing, is in your own handwriting?

A. It is, with the exception of one error on that.

Q. What is that?

A. That is on the floor you are talking about. I didn't change that. The living rooms are over this way (indicating) and it practically faces—this here room (indicating) here was in back of the living quarters, as you call them.

[fol. 81] Q. I see. In other words, on the last page of this Exhibit you have the following words: "Storeroom. Found in this room 92 bags of whiskey, and 150 cases of whiskey," and on the side of it to the left, you have a diagram showing living rooms of the watchman?

A. Yes, sir.

Q. Now, what you meant by that was that the living room was on the side of the house known as No. 609?

A. That is right.

Q. And this room which contained the 92 bags of whiskey was immediately behind?

A. That is right.

Q. And adjoining the living rooms in 609?

A. That is correct.

Q. Now, on the diagram of the third story you show a line as if it were a division between two separate rooms?

A. I do.

Q. That line represents a partition, a wooden partition on the whole floor dividing the building?

A. It does not.

Q. Well, what is that line (indicating)?

A. It indicates that there is different beams and stuff like that, and part of it is boarded up, the same as the store rooms.

[fol. 82] Q. In other words, I will show you Exhibit No. 5 for identification and ask you whether that is a photograph of—whether the wall in that, to the left, shows that partition wall?

A. It resembles it somewhat, you understand, but this is only the part off the elevator.

Q. Yes.

A. As you get off the elevator there was a partition that bore no locks and had these beams which were part of it.

Mr. Kraushaar: I now offer that photograph in evidence.

The Commissioner: I will take it in connection with the testimony.

The Witness: That is the rear part of 609, off the elevator.

(Petitioner's Exhibit No. 5 for identification was thereupon received in evidence and marked "Petitioner's Exhibit No. 5 in evidence, July 25, 1923.")

By Mr. Kraushaar:

Q. Now, I show you Exhibit No. 3 and ask you whether the wall to the left correctly reflects the nature of that wall—if that is a wall?

A. I don't remember that. I didn't make that careful a scrutiny [fol. 83] to look it over, and I don't remember.

Q. But you did make a careful enough scrutiny of the building to be able to make this diagram, Mr. Smith?

A. I did—and still I am wrong.

Q. Still you are what?

A. Still I was wrong, on that one thing.

Q. I see. Now, the second floor of this building is not used as a garage, is it?

A. It is not.

Q. It is a storage room. Both of them are storage rooms, aren't they?

A. Well, you can call it a storage room if you want to. There were goods stored there, but whether it was used for that purpose or not, I don't know.

Q. The third floor is not used as a garage, is it?

A. No, sir.

Q. Now, the fourth floor of the building, you don't know what that is used for?

A. I do not.

Q. You did not inspect that portion of the building at all?

A. No.

Mr. Kraushaar: That is all.

[fol. 84] Mr. Cohen: That is all. You do not raise any point on the question that the stuff which was found there contained more than one half of one per cent of alcohol by volume? You don't raise that question, do you? Otherwise, I will have to go to the trouble of going upstairs for the chemist.

The Witness: The samples were brought here.

Mr. Cohen: Then that is conceded?

Mr. Kraushaar: Well, I do not concede it, but I don't dispute it. I am not raising any question here as to the alcoholic content of the goods seized.

Mr. Cohen: In your papers you say there was so much whiskey seized.

Mr. Kraushaar: I am not raising any question about it, but I am not saying it is conceded.

By Mr. Kraushaar:

Q. Mr. Smith, that is the return, which your associate, Mr. Einstein, made—the writing in pencil on the back?

A. Why, he signed that and I made out the return.

Q. That is the whole return?

A. That is the return that I made out on the premises.

Q. And you made no other return at all?

A. That is the only one. I gave a copy of it to John Steele.

By the Commissioner:

Q. Mr. Smith, did you personally make this return?

[fol. 85] A. Isidor Einstein made that return. I was here with him when he made the return.

Q. Your habit in making such returns upon seizures is to bring in the original warrant and, on the back of it, you indorse what you have seized?

A. I do.

Q. And then you lay it on my desk?

A. Yes, sir.

Q. That is your usual practice?

A. Yes.

Q. Well, in that, of course, you know that you do not conform with the law as to the making of returns? That is, these returns are not made in conformity with the law.

A. Well, they are made as far as we know—they are made the same as the returns on the back—

Q. Well, what you do make in the way of a return is the statement on the back of a warrant of precisely what you have seized under the warrant?

A. Yes, sir.

Q. And, when you make that return, you do not stop to swear to it, but you lay it on my desk?

A. Yes, sir.

Q. And I file it with my papers?

A. Yes, sir.

[fol. 86] Mr. Cohen: If there is any question about that, Mr. Commissioner, I ask leave under the decisions to file a regular return pursuant to the statute, if that is necessary.

Mr. Kraushaar: I think it is too late, at this time.

Mr. Cohen: No, I don't think so, but if they are making any question about it, I want leave to file a correct return.

The Commissioner: Oh, I don't think so. I would say, further than that, that the matter of the return is a thing entirely separate and apart from the question of the validity of the search warrant or its execution.

Mr. Kraushaar: Well, I want to preserve my rights on the question, Mr. Commissioner.

The Commissioner: All right, I will give you an exception to my suggestion.

Mr. Kraushaar: Thank you. I accept.

Now, let me renew the motion that I made at the beginning of the case, and add to it further objections.

At the outset of this case I moved to dismiss the proceedings and vacate the search warrant on the ground that the affidavit on which the warrant was issued was entirely insufficient. I neglected to add [fol. 87] the following ground, that the affidavit upon which this search warrant was issued describes in the caption the premises to be searched as follows: "Premises known as a certain garage at 611 West 46th Street, New York City." The affidavit describes the place at which the prohibition agent was, as in front of the garage located in the building at 611 West 46th Street. He says there that he saw the truck with the cases stenciled "Whiskey." He lays no foundation for the search of any other portion of the building, except in

the affidavit he says he makes the affidavit to procure a search warrant for the building at the above address and any room or rooms used in connection with the garage, the basement or sub-cellar beneath the same, and to seize any intoxicating liquor found therein.

The warrant directs not only the search of the garage, but likewise the building, safe or desk, container, receptacle, basement or sub-cellar, building, room or rooms connected or used in connection with the garage. There is no proof in the affidavit—

The Commissioner: Will you let me see the affidavit?

Mr. Kraushaar: Yes (handing paper to Commissioner).

There is no proof in the affidavit that any other building except the garage contained intoxicating liquor in violation of the pro-[fol. 88] visions of law, and, for that reason, the search warrant was too broad in character and was improvidently issued.

The proof indicates that the agents not only searched the garage, but searched different floors in the building, and there is no proof tending to show that these floors were in anywise used in connection with the garage or had anything whatever to do with the garage. On the contrary, it appears by the testimony of Mr. Smith himself, who made a diagram of the premises, that the upper floors were used as storage rooms, and one portion of it, on the third floor was used for dwelling quarters, thus directly contrary to the statement in the affidavit that the building was used only for business purposes.

I submit that this search, therefore went beyond the warrant—that the warrant was not only improvidently granted in respect to the place to be searched, but that the agents, in making the search went beyond the authority of the warrant and searched the premises other than those which were used in connection with the garage, and the search and seizure were therefore wrongful and unlawful, and, for these reasons, I ask that the warrant be vacated, and the goods restored to the petitioner.

Furthermore, it appears from the testimony in this case that this [fol. 89] building was known as not only as 609, but 611 West 46th Street as well. The photograph of the building which is in evidence indicates that it was built on one plot and, from the outside, one would not know whether there was any dividing line or party wall between the two portions of the building or not, but it does appear from the testimony of the agents that while the garage on the lower floor was entirely open between the two buildings, the upper floors were divided in some respects by partitions.

The Commissioner: No, that does not appear from the testimony. I disagree with you. The testimony shows that on the first floor it was all open.

Mr. Kraushaar: Yes, that is what I say, it was all open.

The Commissioner: That is, on the second floor there were no partitions.

Mr. Kraushaar: Oh, yes, but as I understand it, a partition does not necessarily mean, in my judgment, a solid wall of masonry, nor does it necessarily imply that the walls must be solid.

The Commissioner: The testimony of Einstein in regard to the second floor was that when he got out of the elevator, he could see all through the second floor; isn't that right?

[fol. 90] The Witness: Yes, sir.

Mr. Kraushaar: Mr. Smith says, and his diagram shows, that there was a dividing post, with siding on it, and there was an opening through which he could go from one building to another, and I submit that the mere fact—

The Commissioner: All I would say, Counsellor, is this, that the basement situation controls the whole situation. That was entirely open. Now, there is no dispute about that. The testimony shows that there was on the one side, a staircase running up, I presume, to another floor of the building. On the other side there was an elevator. There had been a staircase running up on that side of the building, but that staircase had been closed up so that it was not open to use; so that the elevator on the one side and the staircase on the other side, served the entire purpose of access to the upper floors of the building.

Mr. Kraushaar: I submit—

The Commissioner: Now, the sign on the building described it as a warehouse. There is nothing on the sign describing it as a garage, and yet the evidence shows that it was a garage. I do not believe that the difference in description between "Garage" and "Warehouse" would be material.

[fol. 91] Now, the agents in their affidavits—the agent swears that this building is used for business purposes only. I have made inquiry about that, and the evidence shows that there was a part of that building which had a cot in it and a table and some chairs. It fails to disclose anything in the way of running water or bath or toilet—

Mr. Kraushaar: Mr. Commissioner, I am prepared to prove by my own witness here—

The Commissioner (continuing): —which are appurtenances of a residence. I suppose the watchman slept in the building from time to time.

Mr. Kraushaar: If you will permit me, I will prove by my own witness here that a portion of the place was used for dwelling purposes and that he lived there as well.

Mr. Cohen: That is not before the Court now. Your Honor is ruling on the evidence that is presented.

The Commissioner: I don't think it is, but of course I want to give you every opportunity.

Mr. Kraushaar: Will you reserve decision, then, at the end of this particular portion of the case?

The Commissioner: Absolutely. You can submit briefs on that.

Mr. Kraushaar: Very well. I will call Mr. Steel.

[fol. 92] JOHN F. STEELE, the Petitioner, was called as a witness in his own behalf and, being first duly sworn, testified as follows:

Direct examination by Mr. Kraushaar:

Q. Now, Mr. Steele, are you the Petitioner in these proceedings?

A. Yes, sir.

Q. Where did you reside on the 6th day of December, 1922?

A. At 609 and 611 West 46th Street.

Q. Now, what floor of that building did you live on?

A. On the third floor.

Q. Was part of that floor used for dwelling purposes?

Mr. Cohen: That is objected to as calling for a conclusion of the witness.

Q. Well, what was the third floor used for?

A. Well, the third floor was used for—half of one side was let out to a drug company, boarded off and let to the Betts Drug Company. They rented half of the entire floor and it was partitioned off with doors, and the other half was used for storage, and the front was used for a living room.

Q. How many living rooms are there in the front?

A. There is the kitchen, and there is a big room, alongside of it.

[fol. 93] Q. Did you live in the dwelling quarters?

A. Yes, sir.

Q. Did anybody else live there?

A. Well, Smith, the watchman. The two of us lived there.

Q. Was there running water in the place?

A. Yes.

Q. Did you do any cooking on the premises?

A. Yes, there was a stove and we did cooking and everything.

Q. You say there was a stove there?

A. Yes.

Q. And you cooked there?

A. Yes.

Q. And ate your meals there?

A. Yes.

Q. Was there a lady living in the place at that time?

A. Yes, sir, at that time, she was.

Q. Was she doing the cooking and taking care of it?

A. Yes, sir.

Q. Now, this building, 609 and 611: Was that one building or was that two buildings?

A. No, there is two buildings.

Q. Now, the ground floor, is that divided off? Do they run in on [fol. 94] one side and—

A. No, that is not divided off. There is pillars in the center, but it is all wide open.

Q. It is open?

A. Yes. We get cars in there, you see, and you could not get any amount of cars in there if it was partitioned off.

Q. Now, that lower part is used as a garage, is it?

A. Yes, sir.

Q. Did you use it for that purpose, yourself?

A. Yes.

Q. Was the second floor used for garage purposes?

A. No, sir.

Q. What was the second floor used for?

A. It was used for storage. The Liquid Carbonic Company at that time only had half of the floor.

Q. Who is the Liquid Carbonic Company?

A. They are the soda-water people, located on 28th Street, and they used it for storage purposes. They stored syrups and a lot of counters and shelving that they had, which they used when they erected candy stores, and they had the whole business up there, whatever belongs to a candy store.

Q. And that was leased to them?

A. Yes.

[fol. 95] Q. The third floor was used by yourself?

A. Half of it was used for storage, and the other half was let out to the medical people by the name of Betts & Company.

Q. Now, did you own the liquor that was found on the third floor?

A. Yes, sir.

Q. In the portion of the premises known as 609?

A. Yes, sir.

Q. That was your own liquor, was it?

A. Yes, sir.

Q. Did you own any part of the liquor found on the second floor?

A. The gin was on the second floor.

Q. Yes. Did you own that?

A. The gin, yes, sir.

Q. Do you know how it came on the second floor?

A. Well, there was—it was stored there, in rooms, you see.

Q. I see. Now, were you there at the time the officers made this search?

A. No, the officers—I was there at the time that an officer came there.

Q. Did you come there at the time they made the search and seizure or afterwards?

[fol. 96] A. I came at the time Mr. Einstein went for a search warrant.

Q. Yes.

A. And then, after he came back with the search warrant, they took me to the station house. I was not there afterwards.

Q. Well, did you know that Einstein was going for a search warrant?

A. I didn't know. He said he had a search warrant, but I didn't see it. Smith, I guess, was the one that seen the search warrant and let them through the building.

Q. You were not there when he came with the search warrant?

A. I was there, but I didn't know he had a search warrant. Mr. Smith told me that he was going for the search warrant.

Mr. Cohen: When you say, "Smith," whom do you mean?

The Witness: Moe Smith.

Q. He told you that Einstein was going for the search warrant?

A. Yes, and I remained there until Einstein came back. He came back in a taxi-cab, and he said that I would have to come to the station house, and of course I went to the station house.

[fol. 97] Now, the second floor of that building: Is that divided off in any way?

A. Yes, sir.

Q. How is it divided off?

A. It is just divided off by wooden partitions.

Q. Is it half of the floor that is divided off?

A. Half the floor is divided. There is the beams or uprights of the buildings there, and there is boards all along. There is a door on the end.

Q. You could not get in or go from one part of the building known as the portion No. 609, to 611, on the second floor?

A. Well, you see they can get into both buildings there by way of the elevator.

Q. Yes.

A. Of course, there is a stairway for 611, but there is also a stairway for 609, but that is seldom used.

Q. But there is a stairway there?

A. There is a stairway there. The elevator is fixed so that you can get into both buildings by way of the elevator.

Q. Let me ask you this question: Is the elevator strong enough for an automobile?

A. Yes, sir.

Q. Can you put an automobile on the elevator and go up with it?

[fol. 98] A. Yes, a medium sized automobile, but not a large size.

Q. Did you ever take automobiles up there?

A. A small Ford, maybe, we took up there.

Q. You haven't stored any automobiles up there recently?

A. Not the last year.

Q. Did you at any time ever use the second floor of that building for the storage of automobiles?

A. No, sir.

Q. Third floor?

A. No, sir.

Q. Or the fourth floor?

A. No, sir.

Mr. Kraushaar: That is all.

Cross-examination by Mr. Cohen:

Q. Are you married?

A. No, sir.

Q. Where did you live before you lived on 46th Street?

A. I lived at 276 West 38th.

Q. How long did you live there?

A. Oh, about three years.

Q. And before you moved there?

A. I have been up at that garage for two or three years—a couple of years. I use to have a lot of trouble with people getting in there [fol. 99] and stealing things, so—

Q. Where you are living now?

A. Yes.

Q. Who else lives there?

A. The watchman, Smith.

Q. And he has a wife?

A. Yes.

Q. There is one bedroom?

A. Yes, he sleeps there, and I sleep in the kitchen.

Q. You are sleeping in the kitchen?

A. Yes.

Q. Now, this partition making these rooms, was of the same kind of boards that you have here (indicating)?

A. All the same kind of boards.

Mr. Kraushaar: No, Counsel is asking you whether the room divided off as the dwelling room, is divided by the same kind of boards as that.

The Witness: It is partitioned off with regular boards running up and down. The other ones run this way (Illustrating).

Q. There are no spaces between the boards?

A. No spaces.

Q. All you have is a small cot?

A. That is all.

Q. And the same in this so-called bedroom?

[fol. 100] A. There is a bedroom with two cots in there.

Q. This separate room where you say you had your whiskey adjoins the bedroom where Smith sleeps?

A. Yes, that is right in the back.

Q. That is also partitioned off with boards?

A. Yes, sir.

Q. And it has a door to it?

A. Yes.

Q. And that door leads out to the open floor?

A. Yes, and also on the other side.

Q. There is one leading into Smith's room and one leading outside towards the elevator?

A. Yes.

The Commissioner: I don't think that is necessary. We have a complete description of the situation. Do you want to put in any memorandum, Counsellor?

Mr. Kraushaar: Might I be permitted to renew the motions made at the beginning of the case?

The Commissioner: I shall deny those motions, subject to hearing you on memorandum.

Mr. Cohen: I haven't any time to put in a memorandum, as I am going away.

The Commissioner: Very well. My own impression is that I shall deny all of these motions at this time. In other words, I am with [fol. 101] the government's contention at the present time. Now, if you care to put in a memorandum, you may do so and try to break down my present conviction.

Mr. Kraushaar: All right, I will do that.

The Commissioner: Take a week and then give me your memorandum by Saturday, so that I can look it over on Sunday.

Mr. Cohen: That is all right, because I don't think I am going away until Tuesday. You will let me see your memorandum?

Mr. Kraushaar: Yes.

The Commissioner: Yes, serve me with your memorandum and I can submit it to the District Attorney.

Mr. Kraushaar: Can't you give me more time?

Mr. Cohen: Yes, except that I am going away.

The Commissioner: Submit your memorandum to me by Saturday, so that I can go over it on Sunday.

Mr. Kraushaar: Very well.

(Hearing closed.)

Petition Denied. 8/29/23.

Samuel M. Hitchcock, U. S. Commr., S. D. N. Y.

[fol. 102]

LIST OF EXHIBITS

Petitioner's Exhibit 1. Photograph.

Petitioner's Exhibit 2. Photograph for Identification.

Petitioner's Exhibit 3. Photograph.

Petitioner's Exhibit 4. Photograph for Identification.

Petitioner's Exhibit 5. Photograph for Identification.

Petitioner's Exhibit 6. Photograph.

Petitioner's Exhibit 7. Diagrams made by Moe Smith.

Petitioner's Exhibit 8. Photograph.

Petitioner's Exhibit 9. Photograph.

[fols. 103 & 104] UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

STIPULATION RE TRANSCRIPT OF RECORD

It is hereby Stipulated and Agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties, and that the original exhibits presented at the hearing can be used on the argument on appeal if requested by the Court.

Dated, November 23, 1923.

Wm. Hayward, Attorney for the United States, Southern District of New York. Meyer Kraushaar, Attorney for the Petitioner.

[fol. 105] UNITED STATES OF AMERICA,
Southern District of New York, ss:

[Title omitted]

CLERK'S CERTIFICATE

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this twenty-eighth day of November, in the year of our Lord one thousand nine hundred and twenty-three, and of the Independence of the said United States the one hundred and forty-eighth.

Alex. Gilchrist, Jr., Clerk. [Seal of the District Court of the United States, Southern District of N. Y.]

Endorsed on cover: File No. 29,995. S. New York D. C. U. S. Term No. 685. John F. Steele, appellant, vs. The United States of America. Filed December 6th, 1923. File No. 29,995.

(1477)